United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-2028

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

NEVIN MAWHINNEY, :

Appellant, :

-against- : No. 76-2028

ROBERT J. HENDERSON, Superintendent, :
PETER PREISER, Commissioner of
Corrections, and NORRIS, Lieutenant, :

Appellees. :

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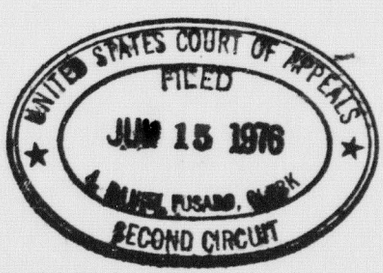
REPLY BRIEF FOR PLAINTIFF-APPELLANT



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REPLY BRIEF FOR PLAINTIFF-APPELLANT

Appellant respectfully submits this reply brief because several issues which appellant could not reasonably have anticipated are raised for the first time by appellees' brief.

I. THIS CASE IS NOT MOOT.

Plaintiff-appellant, a New York State prisoner, began this action for injunctive relief and damages against prison officials in January, 1975, alleging that he was denied an opportunity to practice his religion while in punitive confinement, was denied due process at his disciplinary hearing, and was punished impermissibly for exercising his right of access to the courts. At that time plaintiff was incarcerated at Auburn Correctional Facility, a maximum security prison in New York State. Although defendants have transferred plaintiff to

another prison, he remains in maximum security custody* and could be returned to Auburn at any time.** Defendants try to liken plaintiff's situation to that in Preiser v. Newkirk 422 U.S. 395 (1975), where the case of a prisoner who was challenging his transfer from a medium to a maximum security prison was held to be moot because the prisoner had been returned to the medium security prison soon after the litigation commenced, was in a minimum security prison by the time the case was heard by the Supreme Court, and had a notation placed in his file by prison officials stating that no adverse decisions should follow from the original transfer. 422 U.S. at 402. In Preiser v. Newkirk, the prison officials had voluntarily rectified the harm done to the prisoner and there was "no reasonable expectation that the wrong will be repeated". Id. at 402, quoting U.S. v. W.T.Grant Co., 345 U.S. 629,633 (1953).

In the instant case, however, defendants have done nothing which suggests a change in the practices complained of. If plaintiff is transferred back to Auburn, there is no evidence that he will not be subjected to the same treatment as that he alleged in his complaint.*** Futher, the disciplinary adjudication

* Plaintiff is currently incarcerated at Green Haven Correctional Facility, a maximum security prison.

** Defendants frequently transfer prisoners from one prison to another. Indeed, plaintiff has been transferred twice since initiating this litigation.

*** Since sentences of punitive confinement seldom exceed sixty days, 7 N.Y.C.R.R. §253.5(a)(4), this is clearly a case which is "capable of repetition yet evading review", Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

against him, which he alleges was arrived at without the benefit of due process of law, remains undisturbed on his prison record and could be the basis for future adverse administrative decisions.

In addition, plaintiff clearly states a claim for damages, which survives even if the injunctive claim is moot. Plaintiff's allegations that he was denied the opportunity to practice his religion, that he was subjected to disciplinary confinement without due process months after the United States Supreme Court defined minimal due process requirements in this context,* and that he was punished for exercising his right of access to the courts, could, if proved, merit the award of money damages. See Christman v. Skinner, 468 F.2d 723, 727 (2d Cir. 1972), where this Court held that when a violation of constitutional magnitude is alleged, it is inappropriate to decide as a matter of law that injuries compensable in money damages cannot be proven.

II. PLAINTIFF'S CLAIM OF DENIAL OF RELIGIOUS FREEDOM CANNOT BE RESOLVED ON THE CURRENT RECORD.

Plaintiff alleged in his pro se complaint that he was denied the right to practice his religion while in punitive confinement. In their brief, defendants controvert this claim by alleging that prisoners in punitive confinement at Auburn are permitted to confer with a chaplain at their request. (Brief of Defendants-Appellees, p.8). This unsworn statement

* See Point III, infra.

by appellate counsel is totally outside the record and may not be considered by this Court at this juncture in the litigation.*

Even if alternatives to religious services with general population are available at Auburn, plaintiff may still prove that such alternatives were not available to him, or that they were unnecessarily restrictive of his first amendment rights. Plaintiff is entitled to a determination by the district court as to whether his right to religious freedom was impermissibly abrogated at Auburn. See Brief of Plaintiff-Appellant, pp.5-9.

III. PLAINTIFF ALLEGED A CLEAR VIOLATION OF HIS DUE PROCESS RIGHTS UNDER WOLFF v. McDONNELL.

Defendants argue that Wolff v. McDonnell, 418 U.S. 539 (1974), which established minimum due process requirements in prison disciplinary hearings when punitive confinement or loss of good time are at stake, does not apply to the instant case even though the events complained of here occurred a full five months after the Wolff decision. Defendants' position appears to be that Wolff's applicability to cases in this Circuit dates from the interpretation of Wolff by this Court in U.S. ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975) and Crooks v. Warne, 516 F.2d 837 (2d Cir. 1975). This position is untenable, and reflects a misunderstanding of both Wolff and the later Second Circuit opinions.

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* See, e.g. Burgin v. Henderson, ___ F.2d _____, slip op. 3831, 3836 n.9, (2d Cir. May 24, 1976).

Neither Larkins nor Crooks established new rights for New York State prisoners. Rather, these decisions make clear that Wolff v. McDonnell applies to disciplinary hearings occurring after June 26, 1974, the date it was decided, and establishes the minimum due process required before the imposition of disciplinary confinement in New York.* See also Williams v. Vincent, 508 F.2d 541, 545 (2d Cir. 1974) ". . . the Supreme Court has recently gone beyond Sostre in setting forth minimum due process standards henceforth to be required in prison disciplinary proceedings, Wolff v. McDonnell . . . ." (emphasis added); Cox v. Cook, 420 U.S. 734 (1975).

Defendants also maintain that Wolff and Baxter v. Palmigiano, _____ U.S. _____, 19 Crim. L.R. 3003, 47 L.Ed. 2d 810 (April 20, 1976) do not apply to segregated disciplinary confinement as is practiced in New York State prisons. However, this is clearly incorrect. Wolff was applied to punitive segregation in New York in Crooks v. Warne, supra, 516 F.2d 837 (2d Cir. 1975). And Baxter affirmed the applicability of Wolff in instances where punitive segregation is imposed. 19 Crim. L.R. at 3004, 47 L.Ed.2d at 818.

* In Larkins, where the disciplinary infractions and hearings occurred prior to the Wolff decision, Wolff was not applicable and the relevant due process standard was that set out in Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), cert. denied 404 U.S. 1049 and 405 U.S. 978 (1972). In Crooks, however, where the adjustment committee decided to put a New York State prisoner in punitive confinement after the date of the Wolff decision, the full panoply of Wolff rights was mandated.

CONCLUSION

For the reasons stated herein and in appellant's brief, the judgment of dismissal must be reversed.

Respectfully Submitted,

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New York, New York
July 15, 1976

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
:
COUNTY OF NEW YORK)

ELLEN J. WINNER, being duly sworn, deposes and says:

I am not a party to this case.

On July 15, 1976, I served the within Reply Brief of Plaintiff-Appellant upon Hon. Louis J. Lefkowitz, Attorney General for the State of New York, and David Birch, Esq., Attorneys for the Defendants-Appellees, at Two World Trade Center, New York, New York 10047, the address designated by them for that purpose, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Ellen J. Winner
ELLEN J. WINNER

Sworn to before me this
15th day of July, 1976

Marjorie Smith
Notary Public

MARJORIE SMITH
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-4515701
Qualified in New York County
Commission Expires March 30, 1977